India's Modern Interpretation of the Use of Force in Self-Defence: Treading a Fine Line between Normative Evolution and Legal Exceptionalism

SHORT SYNOPSIS

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by

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ABSTRACT

"The prohibition on the use of force" (Art. 2(4) of the United Nations Charter) has arguably attained the position of a jus cogens or peremptory norm under the international legal order. The "inherent right to use force in individual or collective self-defence" is one of the central exceptions to this prohibition. Article 51 of the UN Charter narrowly circumscribes this exception, authorising the employment of force for defensive purposes solely where an "armed attack" has occurred.

The practical application of this norm of self-defence, however, has significantly altered its implications. The most consequential modification of the norm has been that of "anticipatory self-defence", informed by the Caroline case, which signalled the customary emergence of the rule more than 100 years before the promulgation of the United Nations Charter. This case laid down the new rule that force is permissible where it is undertaken in self-defence before the actual "armed attack", if the threat is "instant, overwhelming, leaving no choice of means, and no moment for deliberation".

Even though the principle of "anticipatory self-defence" sat uneasily with the restrictive scope of Article 51 of the Charter from the start, it underwent further uncomfortable transformation with the advent of asymmetrical war and cross-border terrorism, with varying degrees of control by state/s. It changed the rules of attribution, as much as it created re-conceptualisations of the existing norm of "anticipatory self-defence": preemptive and preventive self-defence.

India's adaptation of the international rule of self-defence, both in theory and in practice, has reflected this evolution of the norm of self-defence. From a reactive and restrained stance, India has chosen to undertake cross-border attacks in self-defence preemptively, while implicitly justifying its actions based on both self-defence and the "unwilling and unable" doctrine.

This thesis critically examines whether India's interpretation and application of self-defence reflect a broader normative shift in the body of law on the resort to force, contributing to the emergence of new customary rules, or whether such practices represent departures from the established jus ad bellum framework. By situating India's conduct as a state in comparison with the state practices of the US and Israel within wider international debates, the study assesses the implications of these developments for the coherence, stability, and future trajectory of international law on self-defence.

Key words: Jus Cogens, Self-Defence, Unwilling or Unable, Anticipatory, Preemptive, Preventive

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1. Introduction

This thesis examines the evolving contours of the international normative system on the resort to force, focusing on how contemporary state behaviour in the international arena has stretched the classical constraints on self-defence under *jus ad bellum* when confronting transnational terrorism and asymmetric conflict. It traces the doctrinal tension between the peremptory international legal ban on recourse to force under 'Article 2(4) of the United Nations (UN) Charter' and the expanding invocation of anticipatory, pre-emptive, and preventive self-defence, with evolving contours of attribution, particularly in cases involving non-state actors (NSAs). Through an analysis of post-9/11 normative developments, attribution standards, and the emergence of the "unwilling or unable" doctrine (UOU), the thesis situates India's evolving practice at the centre of the present evaluation, within a comparative framework alongside the United States and Israel. It argues that while the current developments cannot be fully reconciled with the classical Article 51 framework, they increasingly reflect an emerging *opinio juris* that is being normatively supported by the parallel crystallization of the prohibition of terrorism as an emerging *jus cogens* norm, potentially reshaping the legal architecture of self-defence within the international legal theory.

1.1 The Doctrine of the "Prohibition of the Use of Force" as a *Jus Cogens* Norm

The international legal ban on the recourse to force is a foundational principle of modern international law, codified under 'Article 2(4) of the UN Charter'. Pursuant to this article, States are barred from both the menace and exercise of armed force that compromises another State's territorial wholeness and governmental autonomy, or that contravenes the aims and objectives of the UN.[1] Although Article 2(4) does not expressly qualify the term "force" as "armed" force, the dominant scholarly view interprets the prohibition as primarily directed at military force, rather than at non-forcible forms of pressure such as economic or diplomatic coercion (Justia, 2025; Erin Pobjie, 'Elements of 'Use of Force': Means', 2024; Erin Pobjie, 'The Relationship between the Customary Prohibition of the Use of Force and Article 2(4) of the UN Charter').

[1] Article 2(4) of the United Nations Charter

The normative ban on the employment of force is arguably a peremptory norm[2] of international law, which normatively speaking, allows for two main exceptions under the UN Charter, namely, the inherent or customary right of self-protection following an armed assault[3], which is also enshrined under Article 51 of the UN Charter, and the authority of the UN Security Council to authorize the use of force by air, sea, or land where non-forcible measures have proven inadequate, to preserve or re-establish global peace and stability[4] (Oliver Dorr, 2019; Ruchi Anand, 2009).[5]

Although the bar on the employment of armed force under Article 2(4) of the UN Charter, reinforced by the customary rules under the international legal order, constitutes a foundational element of the contemporary international legal order, the precise meaning and scope of the term "use of force" remain unsettled. The absence of a clearly defined threshold for determining when conduct falls within this prohibition continues to generate significant doctrinal uncertainty (Erin Pobjie, 'Regulating Military Force Series – The Meaning of Prohibited "Use of Force" in Article 2(4) of the UN Charter', 2024). The meaning and ambit of "use of force" are particularly significant in the current context because they determine the breadth of the conceptual divide between an unlawful employment of armed force and an "armed attack," the latter being the threshold that activates the inherent right to self-defence as affirmed by Article 51 of the UN Charter and by customary international law (Erin Pobjie, 'Regulating Military Force Series – The Meaning of Prohibited "Use of Force" in Article 2(4) of the UN Charter', 2024).

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[2] A peremptory norm, or *jus cogens*, in international law is a fundamental, mandatory principle accepted by the global community that prohibits derogation (deviation) and can only be changed by another norm of the same fundamental nature, protecting core interests like prohibitions on genocide, slavery, and torture, rendering conflicting treaties void (Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT)). These norms create obligations owed to the entire international community (erga omnes), allowing any state to challenge breaches, and are essential for upholding universal human dignity.

[3] Article 51 of the United Nations Charter

[4] Article 42 of the United Nations Charter

[5] Although a range of situations are often cited to justify deviations from the prohibition on the use of force under international law, as a matter of strict legality only two exceptions are recognized: the use of force authorized by the UN Security Council under Chapter VII in response to "threats to or breaches of the peace, or acts of aggression", and the "inherent right of individual or collective self-defence" under Article 51 of the UN Charter. See R. Anand. [2009] 'International Legal Exceptions to the Prohibition on the Use of Force' in R. Anand. [2009] *Self Defence in International Relations* (Palgrave, Macmillan, London) pp. 60-83.

International judicial bodies broadly recognise that although any employment of armed force amounts to a use of force, only its gravest manifestations qualify as an "armed attack" sufficient to trigger the "inherent right of self-defence under Article 51 of the UN Charter". Minor incidents such as border skirmishes or routine patrol clashes are therefore treated as uses of force, whereas large-scale invasions, sustained bombardments, or cyber operations resulting in substantial damage or loss of life qualify as armed attacks. The distinction turns on factors such as scale, effects, and intent, as articulated in the case law of bodies such as the International Court of Justice (ICJ) (Christian Marxsen, 2025).[6]

1.2 Understanding Self-Defence as a Narrowly Circumscribed Exception to the Charter-based Ban on the Employment of Armed Force

Three core conditions constrain the exercise of the right of self-defence. First, it may be invoked *only as a response to an armed assault*.[7] Second, any defensive use of force must satisfy the requirements of *necessity and proportionality*[8] in relation to the peril arising from that attack. Third, steps adopted in self-defence must be *promptly reported to the UNSC and remain subject to any subsequent action the Council may decide to take* (Christopher Greenwood, 2011).[9]

Beyond the established requirements of "necessity and proportionality", the lawful exercise of self-defence is also subject to the criterion of *immediacy*, which concerns the temporal proximity between the armed attack and the defensive response. As the interval between the attack and the retaliatory employment of armed force increases, it becomes progressively more difficult to characterise the action as self-defence rather than an unlawful reprisal (Tallinn Manual 2.0). This is an important factor to consider when we are considering modern-day

[6] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v *United States of America*) (Merits) (1986).
[7] Article 51 of the UN Charter
[8] Established under the 1837 Caroline case. *See* Note 7.
[9] See Article 51 of the United Nations (UN) Charter, which states that "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security"*.

anticipatory self-defence.

With the increasing prevalence of asymmetric warfare, where armed attacks are often perpetrated by non-state actors (NSAs), operating with differing levels of support or control from states, in circumstances where clear and settled standards of attribution are lacking[10], the legality of the measures taken by states in self-defence, often in an anticipatory, preemptive or preventive manner, is frequently raising difficult questions under international law (Chris O' Meara, 2022; Elizabeth S. Wilmshurst, 2013).

The foundation of the lawful right to use defensive force within the international legal order is formally outlined in Article 51 of the UN Charter. Although Article 51 codified pre-existing customary rules binding under international law while simultaneously narrowing the scope of permissible self-defence during the Charter's formation, this restrictive formulation has since crystallised into contemporary customary international law and now underpins the current interpretation of the principle of self-defence (Terry D. Gill, Dieter Fleck, 2015; David Kretzmer, 2013). Under Article 51, only reactive self-defence is permitted, meaning that the employment of armed force is lawful solely in reply to an actual "armed attack". The central premise is therefore that self-defence operates *as a reaction to an ongoing or completed armed attack*, rather than as a response to a merely anticipated or future threat (David Kretzmer, 2013).

This restrictive scope of self-defence has, however, interacted uncomfortably with the Caroline case[11], wherein the normative basis of "anticipatory self-defence" was laid down: that the

[10] Within the framework for establishing an internationally wrongful act, attribution denotes the juridical mechanism through which the conduct of private individuals is legally imputed to a State. Put differently, wrongful acts are considered those of the State where a sufficient nexus exists between the individual's behaviour and the State's actions or inaction, including situations involving State acquiescence, failure to exercise due diligence, or affirmative assistance or approval. As a result, the concept of "control" has come to occupy a pivotal position in traditional attribution doctrine, a position codified in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA, 2001).

[11] The 1837 Caroline incident was a diplomatic incident between the United States and Great Britain, originating from a raid by British forces on the American steamboat Caroline to stop it from supplying Canadian rebels on Navy Island. This event, which involved the sinking of the Caroline and the death of an American citizen, led to a significant international legal precedent for self-defence. The 1837 Caroline case primarily consisted of diplomatic correspondence, particularly U.S. Secretary of State Daniel Webster's letters

necessity to apply force in self-defence *before an actual armed attack* must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation".[12]

This theory of anticipatory self-defence in modern times has once again undergone an enormous transformation, especially due to the rise in asymmetric wars, especially in the form of cross-border terrorist attacks by NSAs. The theory of pre-emptive self-defence[13] as a defensive action in response to an "imminent threat" received formal recognition in the wake of the 11 September 2001 attacks in New York, which had profound global repercussions. This international recognition is evident in UNSC Resolutions 1368 (2001) and 1373 (2001), which implicitly recognised the right of the United States to respond pre-emptively in self-defence against Al-Qaeda and the Taliban (Christian J. Tams, 2009; Steven R. Ratner, 2013).

1.3 The Modern Tenets of "Anticipatory Self-Defence"

The doctrine of anticipatory self-defence today falls into three primary classifications, which vary widely as regards the threshold for the act of self-defence or 'necessity,' and the degree of their enmeshment in the progressive formation of customary rules on self-defence: anticipatory self-defence[14], pre-emptive self-defence[15], and preventive self-defence[16]. In other words, anticipatory, preemptive, and preventive self-defence describe escalating levels of responding to threats before an attack, differing mainly in the *imminence of the perceived danger and their legality*. The normatively strict doctrine of anticipatory self-defence, as derived from the Caroline case (described above), is described as being an action against an imminent attack, requiring utmost certainty and necessity (a kind of situation that hardly matches any of the practical circumstances for the use of self-defence in the present times). The doctrine of pre-emptive self-defence addresses a *known, immediate* threat where delay

to Lord Ashburton, which established the international legal order standard for self-defence: necessity must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation" (the Caroline Test).

[12] *Ibid*.

[13] Pre-emptive self-defence denotes an act of self-defence as a retaliation to a threat that is imminent but not certain, unlike the doctrine of "anticipatory self-defence", as laid down in the 1837 Caroline case.

[14] Talks about the rule established under Caroline case, wherein the threat and the necessity to a defensive action should be "instant, overwhelming, and without providing a moment for deliberation".

[15] *See* Note 9.

[16] A defensive action in reply to a non-imminent, future threat. This re-conceptualisation is highly debated within international law, with most international scholars failing to provide any recognition to it.

means disaster. Lastly, the doctrine of preventive self-defence is the broadest, targeting potential future threats, without any immediate certainty, and which is widely contested within modern international law (Megan C. Mallone, Christine E. Seibert, 2018).

The doctrine of "pre-emptive self-defence", as stated above, received formal recognition under international law through the UN Security Council (UNSC) resolutions 1368 and 1373, where the right to pre-emptive self-defence against imminent attacks from NSAs was for the first time formally recognised under the aegis of the UNSC, after the 9/11 attacks of 2001 in New York by Al Qaeda. After these resolutions, the US and the UK attacked Afghanistan, which was allegedly the operational hub of Al Qaeda, informing the UNSC soon after, also receiving formal acceptance from the UNSC as having carried out an attack that was justified within the parameters of Article 51 of the UN Charter. The objective of the military operations was to forestall and discourage any further attacks against the United States (Michael N. Schmitt, 'Counter-Terrorism and the Use of Force in International Law', 2003). This principle of "pre-emptive self-defence", however, quickly transformed, through questionable state practice, primarily that of the US, into what has been historically expounded as the notorious 'Bush Doctrine', which essentially propounded the doctrine of 'preventive self-defence', or, as explained above, an act of defence against potential, future threats. This has been primarily exemplified through the US invasion of Iraq in 2003, other defensive uses of armed force to establish democracy in the Middle East, as well as its continued use of this norm as a justification for its use of force in Iran and Venezuela in 2025 (Robert J. Delahunty, John Yoo, 2009; Michael W. Doyle, 2008; Henry Shue, 2016; Micah Zenko, 2011).

In contemporary state conduct in international relations, the notion of "pre-emptive self-defence" has been expanded to encompass the principle of preventive self-defence, which seeks to explain the employment of armed force to neutralise prospective or potential threats before they materialise. This broader conception remains highly contested within the international legal order and has not achieved general acceptance, as it is widely criticised for eroding established legal boundaries and increasing the risk of unlawful aggression (Ashley Deeks, 2016).

The modern-day construct of pre-emptive and preventive self-defence, arguably adopted in the current state practice, also raises considerable questions regarding attribution, as well as sovereignty concerns.

The concept and theory of attribution do not belong to the jurisprudence of "*jus ad bellum*". It has been adopted from the jurisprudence outside of "*jus ad bellum*" to establish a legal basis upon which an employment of armed force or armed attack in self-defence can be taken on the soil of the allegedly belligerent state (originally a doctrine from the law of state responsibility). It means that for a legal deployment of force in the exercise of self-defence against a state, the armed assault in the first place must be legally attributable to such state, failing the presence of which the said defensive action may be considered not only as an illegal reprisal, but also against the territorial inviolability of such state (Nicholas Tsagourias, 2025; Voelkkerechtsblog, 2025).

In the present times, due to increasing terrorist attacks being made by the NSAs with unsettled support from the host state, the question of attribution has become complicated and increasingly convoluted.

In this regard, on the one hand, there has been the evolving concept of the "overall control test", established by the International Criminal Tribunal for Yugoslavia (ICTY) in the Tadić case[17], and on the other hand, the unsettled concept of "non-attribution" under the "unwilling and unable" (UOU) test.

The "overall control" test has developed in contradistinction to the "effective control" test developed by the ICJ in the case of "Military and Paramilitary Activities in and Against Nicaragua"[18], and applied yet again in its Genocide judgment.[19] The test constitutes a legal criterion under the international legal order for assessing whether the conduct of an organised

[17] *Prosecutor* v. *Tadić*, Case No. IT-94–1-A, Judgment, para. 120 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber July 15, 1999).
[18] Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua* v. *U.S.*), Merits, 1986 ICJ REP. 14, para. 115 (June 27).
[19] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, Merits, ICJ GL No 91, 26 February 2007.

armed group may be legally imputed to a State.

The "overall control" test posits that a state may be considered as exercising sufficient power and authority over an organized armed group where it provides sustained financial, logistical, or organizational assistance and participates in, or coordinates, the group's general military planning. This standard stands in contrast to the "effective control" test endorsed by the ICJ, which requires proof that the host-state directed or enforced the conduct of the specific wrongful act for attribution to arise. Within contemporary debates on self-defence, some strands of state practice and scholarship suggest that where overall control is established, the conduct of the armed group may be attributed to the state, thereby engaging its international responsibility and rendering the exercise of force for defensive purposes against that state *prima facie* lawful (Nicholas Tsagourias, Michael Farell, 2020).

With respect to the theory of non-attribution, the central controversy within the international legal order concerns whether a State may lawfully employ force in self-defence within the territory of another State against NSAs, such as terrorist organisations, where the territorial State is purportedly "unable or unwilling" to prevent their conduct, or whether such acts must instead be attributed to the host State as a matter of international law. The UOU doctrine, which has been increasingly invoked in recent practice to justify the defensive actions, rests on the assumption that a victim State may act militarily when the territorial or host state is incapable of or unwilling to suppress armed assaults by NSAs, thereby *dispensing with the traditional requirement of State attribution*. Notwithstanding its growing invocation, the doctrine remains highly contested and has not achieved clear acceptance under international law[20] (Suraj D. Bhaskaran, 2021).

1.4 The Evolution of India's Defence Strategies

[20] The law of attribution attracted renewed and intensified scholarly scrutiny after its express reliance in the context of the 2014 US-led military operations against ISIS in Syria. The intervention was defended on the ground that Syria was "unable or unwilling" to prevent its territory from being utilised by ISIS to mount armed attacks, thereby purportedly allowing the exercise of self-defence without the need to attribute those attacks directly to the Syrian State. See Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play', 91 *INT'L L. STUD.* 1 (2015).

Since gaining independence in 1947, India has participated in a number of major conflicts. With the passage of time, its self-defence strategy and its legal reasoning under the UN Charter have developed substantially. From relying on a claim of self-defence premised on an armed attack occurring on its sovereign territory in the course of the 1999 Kargil hostilities (Sunil Rao, 2016)[21], to taking up "pre-emptive defence" armed actions in the recent incidents against NSAs based within the territory of the host state, arguably on the premise of the UOU test (Srinivas Burra, 2018)[22], India has come a long way in its adaptation and usage of the different tenets and components of the norm of self-defence, including the various notions of anticipatory self-defence.

Before the 1999 Kargil War, India's interpretation and practice of self-defence were largely defined by strategic restraint, a predominantly reactive approach, and a strict commitment to territorial integrity, reflected in its consistent avoidance of cross-border military operations (Anderson, 2001; Sunil Dasgupta, Stephen P. Cohen, 2011).[23] In other words, traditionally, India grounded its resort to force within the parameters of Article 51 of the UN Charter, which authorises self-defence only upon the commission of an armed assault. Although these attacks were frequently linked to entities supported by States, India's military response was largely confined to its own territorial boundaries. The Kargil conflict revealed the limitations of this

[21] Pakistan deployed both regular and irregular forces, prompting the Indian Army to initiate an offensive known as "Operation Vijay," aimed at containing the incursions and expelling the infiltrators. Within this framework, the transboundary action undertaken by Pakistan amounted to an armed attack legally imputable to the State of Pakistan. Accordingly, India had clearly been subjected to an armed attack by Pakistan prior to invoking its right of self-defence. See Sunil Rao, "The Kargil Incident – Historical Analysis", 43 Indian Historical Review 1 (2016), pp. 1-33.

[22] Allegations and counter-allegations of cross-border terrorism between India and Pakistan have been a recurring feature of their relations. Although intermittent firing incidents have taken place, these have typically not developed into full-scale hostilities. Nevertheless, some episodes have entailed the exercise of armed force with a degree of intensity and reach sufficient to amount to a "use of force" in legal terms. Prominent examples include the Uri surgical strikes in 2016, the Balakot airstrikes in 2019, and Operation Sindoor in 2025. See Srinivas Burra, "Use of Force as Self-Defence against Non-State Actors and TWAIL Considerations: A Critical Analysis of India's State Practice", Asian Yearbook of International Law, Volume 24 (2018), pp. 106-127.

[23] Mahatma Gandhi and Jawaharlal Nehru (prime minister from 1947—1964), who played a decisive role in shaping independent India, regarded the exercise of armed force as both normatively objectionable and strategically burdensome for the state (Stephen P. Cohen, The Indian Army: Its Contribution to the Development of a Nation (New York: Oxford University Press U.S.A., 2001), pp. 57—87). British physicist P. M. S. Blackett's defence report, which found acceptance in India, urged the country to curb its strategic ambitions and pursue a policy of non-alignment to avert an unnecessary arms race, while recommending that defence spending be limited to under two per cent of GDP (Anderson, ''Empire's Setting Sun? Patrick Blackett and Military and Scientific Development of India,'' Economic and Political Weekly 36, no. 39 (September 29-October 5, 2001): pp. 3703—3720).

doctrinal approach and precipitated a notable shift in India's security policy in the subsequent years (Kripa Nautiyal, 2025; Ashu Mann, 2025).

The experience of Kargil prompted a substantive recalibration of India's defence doctrine, shifting it from a stance of sustained restraint towards one that contemplates proactive and decisive measures against state-sponsored terrorism. In the post-Kargil period, India began to advance a broader legal understanding of the "right of self-defence", including the potential use of pre-emptive or preventive force against NSAs operating from the territory of a host state that is alleged to be "unwilling or unable" to neutralise the threat, even where the strict requirements of attribution under international law are not fully satisfied (Chistopher Clary, 2018; S.P. Kapur, 2005; Sumit Ganguly, 2019).

1.5 India's Modern Interpretation and Application of the Employment of Force for Defensive Purposes – Cross-Border Counter-Terrorism Practice

Since 2016, India has undertaken a series of cross-border military operations—including the 2016 "surgical strikes," the 2019 Balakot airstrike following the Pulwama attack, subsequent actions across the Line of Control in later years, and most recently Operation SINDOOR in 2025—each of which involved, to some extent, claims based on the right of self-defence vis-à-vis the NSAs. Those episodes make India a key state-practice case for testing how the UOU and pre-emptive self-defence doctrines are developing (Karthika Sasikumar, 2019; Dhruv Sharma, Utkarsha Shrivastava, 2019).

The Indian government officially described the 2016 surgical strikes as a "pre-emptive" counter-terrorism operation based on specific intelligence (Transcript of Joint Briefing by MEA and MoD, 2016; Bharat H. Desai, 2017; Karthika Sasikumar, 2019). The government, thus, sought to characterise the operation as a measure of "pre-emptive strike" undertaken in response to imminent threats, while deliberately refraining from employing terminology that remains contested under international law (Sushant Singh, 2017; Harsh V. Pant, Ritika Passi, 2017).

In 2019, a terrorist attack targeted Indian security personnel in the Pulwama district of

Kashmir, for which responsibility was claimed by Jaish-e-Mohammed (JeM), a terrorist organisation designated by the United Nations. On the morning of 26 February 2019, the Foreign Secretary of India's Ministry of External Affairs issued a statement asserting that the Indian Air Force had carried out a "non-military pre-emptive action" (sic) targeting a JeM military camp in Balakot, Pakistan (Press Release, 2019).

Two aspects are particularly salient in this context: first, the meaning and legal significance of India's use of the term "non-military pre-emptive action" in its official statement[24]; and second, the scope of a State's right to exercise self-defence against NSAs operating from the territory of another State, as reflected in India's articulated legal position on this issue (Dhruv Sharma, Utkarsh Shrivastava, 2019).

On 22 April 2025, the tourist town of Pahalgam in the Indian Union Territory of Jammu and Kashmir experienced one of the deadliest terrorist attacks in recent years. In response, India launched a military operation—designated Operation SINDOOR—directed at what it described as terrorist infrastructure operating from Pakistani territory. The situation subsequently escalated when Pakistan carried out drone strikes, prompting Indian retaliatory actions that reportedly struck Pakistani military installations in and around Islamabad (Abhinand Siddharth S., 2025). India made an official statement following the operation on May 07, 2025, stating that "[d]espite a fortnight having passed since the attacks, there has been no demonstrable step from Pakistan to take action against the terrorist infrastructure on its territory or on territory under its control. [Therefore], earlier this morning India exercised its right to respond and pre-empt as well as deter more such cross-border attacks. These actions were measured, non-escalatory, proportionate, and responsible. They focused on dismantling the terrorist infrastructure and disabling terrorists likely to be sent across to India" (Statement by Foreign Secretary, 2025).

Scholarly commentary suggests that, in its official statements following armed reprisals against terrorist groups based in Pakistan over the past decade, *India has alluded to the right of self-*

[24] The invocation of the term "non-military" is of particular significance in this context, as it appears to clarify that the object of the operation was an NSA, rather than the armed forces or civilian population of Pakistan.

defence under Article 51 of the UN Charter only implicitly, without formally invoking it. At the same time, India is said to have implicitly relied on the UOU doctrine, referring to it cautiously and obliquely without formally endorsing or expressly articulating the doctrine (Abhinand Siddharth S., 2025). Accordingly, some scholars contend that by avoiding an explicit invocation of the UN Charter's self-defence framework, India appears to be acting within the legal grey areas of the *jus ad bellum* to advance its long-standing aim of targeting and dismantling terrorist infrastructure in Pakistan (Abhinand Siddharth S., 2025). However, other scholars hold that India's current justifications for its use of force on the territory of a foreign state do not fall within any established international law paradigm and that India's present posture requires international legal justification to withstand international scrutiny (Bharat H. Desai, 2017).

1.6 India's Interaction with International Law

India highlights the relevance of international legal norms in its Constitution and incorporates them as a directive principle to foster respect for international law under Article 51.[25] Articles 73[26] and 253[27] of the Indian Constitution establish a dualist approach (Vivek Sehrawat, 2021).[28] A dualist approach means that treaties don't automatically become domestic law: Parliament must pass specific legislation (using Article 253's power) to incorporate them, a process enabled by Article 73, which grants the Union Executive power over international matters, extending to areas Parliament legislates on. Concurrently, the Indian Supreme Court has taken a progressively activist stance by relying on international treaties and customary rules of the international legal order to address legislative lacunae—especially in the areas of

[25] Article 51 of the Indian Constitution, found in the Directive Principles of State Policy (Part IV), mandates that "the State shall promote international peace and security by maintaining just relations between nations, fostering respect for international law and treaties, and encouraging the settlement of international disputes by arbitration, aligning India's foreign policy with global cooperation and UN Charter principles".
[26] Article 73 of the Indian Constitution defines the Extent of the Union's Executive Power, stating it "covers matters Parliament legislates on, and also the exercise of rights, authority, and jurisdiction derived from any treaty or agreement by the Government of India".
[27] Article 253 of the Indian Constitution grants Parliament "the exclusive power to legislate for the entire or any part of India to implement international treaties, agreements, conventions, or decisions from international bodies".
[28] As per the dualist theory, international law and municipal law operate as two separate and independent legal systems. Under this model, international law lacks direct applicability within the domestic legal system and must be incorporated through national legislation before domestic courts may give it effect.

human rights and environmental protection—thereby reflecting clear monist inclinations in defining India's approach to international law (Vivek Sehrawat, 2021).[29]

The core of modern *jus ad bellum* (the body of rules determining when a State is permitted to exercise armed force under the international legal order (the "right to war")) is Article 2(4), which strictly limits the recourse to armed force to specific exceptions (self-defence and Security Council authorization, as explained above), and which is widely accepted in theory and practice as a *jus cogens* or peremptory norm (Olivier Corten, Vaios, Koutroulis, 2021).

Therefore, all states – including India – are *legally bound to respect and uphold these norms regardless of consent, treaty obligations, or domestic law*.[30] In other words, *jus cogens* norms are binding due to their peremptory status and their incorporation through domestic jurisprudence. For instance, the SC of India has repeatedly held that customary international law is automatically part of the national legal system, barring the case when it is contrary to a statute.[31] There are many scholars, however, who contend that in India, *jus cogens* norms have a hierarchical superiority over both domestic legislation and ordinary treaty rules (Umesh Kadam, 2018; V.S. Mani, 2007; P.S. Rao, 2008; Erika De Wet, 2006).

Therefore, there is a first set of scholarship that states cannot rely on counter-terrorism or sovereignty arguments to avoid *jus cogens* obligations of the restriction on the exercise of armed force by invoking the requirement of self-defence (Christian J. Tams, 2009; Hu, X, 2025). However, there is also the counter-claim that terrorist acts *must* be subject to universal jurisdiction due to their *jus cogens* nature, despite state immunity claims. Because these acts contravene core principles accepted by the international community, the seriousness of the offence should take precedence over conventional State immunities (Aniel Caro De Beer,

[29] The monist approach maintains that international law and domestic law constitute a single, integrated legal order, within which the same legal subjects are governed by both systems. Accordingly, in a monist framework, international law does not require legislative incorporation to take effect domestically; it becomes part of the internal legal order automatically upon the ratification of an international treaty. Moreover, under such systems, domestic law is subordinated to international law.

[30] Despite an unequivocal international position on this point, the idea in Indian jurisprudence is, nevertheless, well-contested.

[31] *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011; *People's Union for Civil Liberties* v. *Union of India* (AIR 2004 SUPREME COURT 1442) (torture, illegal detention violate peremptory norms); *Kishen Pattnayak* v. *State of Orissa* (AIR 1989 SC 677) (fundamental rights aligned with peremptory human-rights obligations).

2019), as well as the traditional strict approach to the peremptory norm on the restriction on the use of armed force.

In summary, it may be contended that while the modern, broadened conception of self-defence—moulded by asymmetric and proxy conflicts and extending to pre-emptive and preventive recourse to force—cannot be persuasively reconciled with the strict textual limits of Article 51 of the UN Charter, prevailing State practice nevertheless suggests a divergent trajectory. The international demeanor of states, including India, increasingly reflects an emerging *opinio juris* suggesting that pre-emptive self-defence against terrorist threats is being treated as an evolving component of the modern law of self-defence within the *jus ad bellum* framework.

India's broadened conception of self-defence, in addition, appears not to offend the *jus cogens* obligation of prohibiting the exercise of armed force, insofar as it is rooted in the concurrent development of a peremptory norm prohibiting terrorism.[32] Notwithstanding the above, there remains a pressing need for India to institutionalise a coherent framework that systematically integrates international law into state policy on external affairs, including the calibrated use of force in self-defence, as such an architecture appears largely absent from the recent legal justifications articulated by the Ministry of External Affairs (Bharat H. Desai, 2017).

1.7 Comparative State Practice: India, the United States, and Israel

To substantiate the foregoing claims regarding the emergence of *opinio juris* and the consequent crystallisation of a limited customary rule within the self-defence component of *jus ad bellum*—one that accommodates pre-emptive and non-attributive self-defence, or self-defence based on a lowered attribution threshold—it is essential to undertake a comparative assessment of pertinent State conduct. For reasons of practical manageability and to maintain doctrinal coherence within this thesis, the present study concentrates on the practice of the United States and Israel, as the two States that have most consistently and expressly relied upon doctrines of pre-emptive self-defence in both the regional and international contexts.

[32] Article 53 of the VCLT.

Their practice will be examined comparatively, with particular attention to how it informs and contrasts with the contemporary State practice of India.

Although both the theoretical foundations of pre-emptive self-defence and its invocation in State practice predate the adoption of the United Nations Charter, any meaningful contemporary analysis of the doctrine must begin with the terrorist attacks of 11 September 2001. These attacks constitute the nucleus of the modern evolution of pre-emptive self-defence under *jus ad bellum*. The scale, coordination, and destructive impact of the 9/11 attacks were unprecedented, triggering an exceptional and near-universal international response. This reaction ultimately gave rise to what became known as the "Global War on Terrorism," spearheaded by the United States of America.

In the immediate aftermath of the attacks, Al Qaeda was identified as the principal perpetrator, and focus quickly shifted to Afghanistan, which was accused of harbouring and supporting the group's leadership. Soon thereafter, the United States and the United Kingdom launched the initial phase of "Operation Enduring Freedom"[33], consisting of targeted airstrikes against Al Qaeda and Taliban installations. Acting under Article 51 of the UN Charter, the United States formally informed the Security Council that it was exercising the recognised right of self-defence, both individually and collectively. The articulated purpose of the military operations was to forestall and deter any further attacks on the United States and the states supporting it (Michael Schmitt, 'Counter-Terrorism and the Use of Force in International Law', 2003).

On 12 September 2001, the Security Council adopted Resolution 1368, in which it condemned the terrorist attacks in unequivocal terms, characterising them as "horrifying" and recognising them as a "threat to international peace and security". Significantly, the resolution reaffirmed "the inherent right of individual and collective self-defence" as enshrined in the UN Charter (Article 51). This position was reinforced by Resolution 1373, adopted on 28 September 2001, which likewise invoked the right of self-defence and established a comprehensive framework

[33] Operation Enduring Freedom (OEF) was a U.S.-led coalition military campaign launched in October 2001 as a retaliation to the 9/11 attacks, directed against al-Qaeda and the Taliban in Afghanistan. The operation aimed to dismantle terrorist networks, oust the Taliban regime, and support the reconstruction of the country, constituting the opening phase of the armed conflict in Afghanistan.

for counter-terrorism cooperation. The resolution called upon States to take an array of measures, including measures to curb terrorist financing, prevent terrorists and their backers from finding refuge, and strengthen cooperation in law enforcement and intelligence sharing (Michael Schmitt, 'Counter-Terrorism and the Use of Force in International Law', 2003).

Through these resolutions, the United Nations can be understood as implicitly recognising a limited legal basis for pre-emptive self-defence where an armed attack was ongoing or imminently threatened. However, the precise meaning of *"imminence"* remained undefined and continues to be contested. This ambiguity was subsequently exploited by the United States through the articulation of the so-called *Bush Doctrine*, which significantly expanded the scope of pre-emptive self-defence to encompass responses to potential or future threats—commonly described as "*preventive self-defence*". The emergence of preventive self-defence has, in turn, blurred the legal boundaries of pre-emptive self-defence and has contributed to considerable uncertainty regarding the limits of lawful self-defence under contemporary international law.

The 'Bush Doctrine', articulated in 2002, denotes the United States' strategy of neutralizing rogue states and their affiliated terrorist groups before they acquire the capacity to threaten or deploy weapons of mass destruction (WMD) against the US and its supporters. The 2003 invasion of Iraq and "Axis of Evil" Strategy (confronting rogue states through intense diplomatic pressure, economic sanctions, and the threat of military action to halt nuclear ambitions, for example, in Iran and North Korea) are the primary examples of this doctrine (Michael Doyle, 2008; Sanjay Gupta, 2008; Charles Pierson, 2004).

This pre-emptive/preventive conception of self-defence remains evident in contemporary U.S. state practice and has arguably informed its 2025 employment of armed force against Iranian nuclear installations and targets in Venezuela (Marco Milanovic, 2025; Marco Milanovic, 2026).

On 7 October 2023, Hamas carried out a large-scale attack against Israel, widely regarded as among the most severe terrorist incidents in recent history and in Israel's experience. In the aftermath, Israel initiated an extensive military campaign targeting Hamas and associated

military objectives in Gaza, prompting intense debate regarding the scope and legality of Israel's right of self-defence against Hamas under international law. The core of the arguments that have followed is that, because Gaza's status is disputed under international law, the self-defence regime under the UN Charter—particularly Article 51—is considered inapplicable. Eminent scholars in the field, however, believe that in light of the evolution of international law since the 9/11 attacks—or at least the way many states now interpret it—Israel's exercise of armed force in this context appears to rest on a plausible legal foundation under international law (Eric A. Heinze, 2024).

1.8 Legal Justifications for Pre-emptive Counter-Terrorism Operations

The legal basis advanced for contemporary "pre-emptive" counter-terrorism operations rests mainly on two grounds. First, it relies on the expanded understanding of pre-emptive self-defence against "imminent" threats, which gained a degree of legal recognition through UN Security Council Resolutions 1368 and 1373 adopted after the 9/11 attacks. Second, it draws on the theory that the prohibition of terrorism is crystallising as an emerging *jus cogens* norm, one that may justify pre-emptive—though not preventive—uses of force against NSAs in situations of asymmetric warfare (Aniel Caro de Beer, 2019).

2. Literature Review

2.1.The Ban on Employing Armed Force as a *Jus Cogens* Norm

The ban on the employment of armed force, enshrined in Article 2(4) of the UN Charter, is broadly recognised as a cornerstone of the international legal system established after 1945 (Gray, C. [2008] *International Law and the Use of Force* 3rd Ed, Oxford). Prominent doctrinal works consistently identify Article 2(4) as establishing a near-absolute bar on inter-state force, subject only to the two main (Charter) exceptions—Security Council authorisation and individual or collective self-defence under Article 51 (Art 2(4), Repertory, Suppl. 3, Vol. 1, United Nations Office of Legal Affairs; Anand, R. [2009] 'International Legal Exceptions to the Prohibition on the Use of Force', pp. 60-83 in Anand, R. [2009] *Self-Defense in International Relations* London: Palgrave Macmillan).

Under this view, since the prohibition in Article 2(4) has acquired the status of a *jus cogens* norm, no derogation is permitted unless and until a subsequent peremptory norm of international law emerges. The view finds support in Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) and Article 41 of the ARSIWA. This literature establishes the normative rigidity of the prohibition, thereby framing contemporary debates on anticipatory, pre-emptive, and preventive uses of force (Pobjie, E. [2024] 'The Relationship between the Customary Prohibition of the Use of Force and Article 2(4) of the UN Charter' in Pobjie, E. [2024] *Prohibited Force: The Meaning of 'Use of Force' in International Law* Heidelberg: University of Essex and Max Planck Institute for Comparative Public Law and International Law); Green, J.A. [2011] 'Questioning the Peremptory Status of the Prohibition of the Use of Force', *Mich. J. Int'l L.* 32, p. 215; De Hoogh, A. [2015] 'Jus Cogens and the Use of Armed Force', pp. 1161-1186 in Weller, M. [2015] ed. [2015] *The Oxford Handbook of the Use of Force in International Law* OUP).

2.2. Defining "Use of Force," the Gap Between Use of Force and Armed Attack, and the Threshold Problem

Scholars note that the absence of a precise definition for 'use of force' generates a conceptual distinction between minor acts of force, which may amount to illegal coercion, and the more serious category of an 'armed attack,' which is the only circumstance that triggers the recognized prerogative of self-defence under Article 51 (Pobjie, E. [2024] 'Introduction', pp. 1-14 and 'Elements of Prohibited Force', pp. 81-158 in Pobjie, E. [2024] *Prohibited Force: The Meaning of 'Use of Force' in International Law* Heidelberg: University of Essex and Max Planck Institute for Comparative Public Law and International Law).

ICJ jurisprudence, particularly *Nicaragua*, *Oil Platforms*, and *Armed Activities on the Territory of the Congo*, has reinforced this distinction by holding that only the "most grave" forms of force constitute armed attacks.

2.3. Necessity, Proportionality, and Immediacy as Customary Requirements

Necessity and proportionality have long been accepted as customary limitations on the exercise of self-defence. Writers explain that necessity concerns whether the use of force is the sole effective means of stopping the attack, whereas proportionality pertains to the intensity and extent of the defensive response. A third element—immediacy—focuses on the temporal nexus between the attack and the reaction. As the lapse of time increases, so too does the danger that a claim of self-defence will devolve into an unlawful reprisal. This requirement assumes particular importance in assessing the legality of anticipatory or pre-emptive uses of force, where no armed attack has yet materialized (Dinstein, Y. [2005] *War, Aggression and Self-Defence*, Cambridge: Cambridge University Press, 4th Edition; Bethlehem, D. [2012] 'Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack', *American Journal of International Law*).

2.4.Anticipatory, Pre-Emptive, and Preventive Self-Defence: Doctrinal Evolution

The contemporary debate on anticipatory force has deep historical roots. The Caroline incident remains the doctrinal starting point, establishing that anticipatory self-defence is lawful only when the necessity is "instant, overwhelming, leaving no choice of means, and no moment for deliberation." Scholars overwhelmingly treat Caroline as forming a stringent customary standard (Schmitt, M.N. [2010] 'Preemptive Strategies in International Law', *Mich. J. Int'l L.* 24, p. 513 (2003); Ruys, T. [2010] *Armed Attack and Article 51 of the UN Charter* CUP).

Following the 9/11 attacks, extensive scholarship analysed whether SC Resolutions 1368 and 1373 implicitly broadened the right of self-defence to include responses to attacks by NSAs. (Tams, C.J. [2009] 'The Use of Force Against Terrorists' *EJIL* 20(2); Ratner, S.R. 'Self-Defence Against Terrorists: The Meaning of Armed Attack', in Herik, et al. eds. [2013] *Counter-Terrorism Strategies in a Fragmented International Order: Meeting the Challenges* CUP).

The more recent practice of states such as the United States, Israel, Turkey, and increasingly India has stretched the boundaries from anticipatory to pre-emptive and even preventive self-defence. Preventive self-defence—acting against a threat that is neither immediate nor certain—remains broadly contested in scholarship. Scholars are divided into two main schools

of thought: the restrictive interpretation school, which denies its legality (Saidi, I. [2025] 'The Right to Preventive Self-Defence: A Threat to Collective Security?' *Science of Law* 3), and the expansive interpretation school, which seeks to adapt international law to modern security threats (Hu, X. et al. [2025] 'The legality and enlightenment of preventive self-defence in international counter-terrorism' *Humanit Soc Sci Commun* 12, p. 879).

2.5. The Necessity of Attribution (Effective Control, Overall Control), and the Rise of Non-Attribution Doctrines

Attribution challenges lie at the heart of contemporary self-defence debates. The ICJ's *Nicaragua* standard of effective control, requiring specific instructions or direction of the wrongful act, imposes a high threshold. The ICTY's *Tadić* formulation of overall control lowers the bar by requiring only organisational, logistical, and general operational control. Scholarly commentary is divided: some defend *Nicaragua* for maintaining legal predictability; others argue that *Tadić* better reflects the realities of proxy conflict (Tams, C. [2007] 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *EJIL*; Gal, T. [2014] 'Unexplored Outcomes of Tadić: Applicability of the Law of Occupation to War by Proxy', *Journal of International Criminal Justice* 12(1)).

A parallel debate concerns the UOU doctrine. Works by many scholars invoke this doctrine to justify strikes against NSAs on foreign territory without attribution. Critics, however, argue that UOU violates state sovereignty and risks re-legitimising unilateral uses of force under a vague rubric (Blum, G. et al. [2022] 'The Unable or Unwilling Doctrine: A View from Private Law' *Harvard International Law Journal* 63(1); Meara, C.O. [2021] 'Necessity and Proportionality and Armed Attacks by Non-State Actors' pp. 172-226 in Meara, C.O. *Necessity and Proportionality and the Right of Self-Defence in International Law* OUP; Voelkkerechtsblog [2025] 'Oh Self-Defence, Where Art Thou?' *Voelkkerechtsblog* [Online]. Available at: https://voelkerrechtsblog.org/oh-self-defence-where-art-thou/#:~:text=The%20%E2%80%9Cunwilling%20or%20unable%E2%80%9D%20doctrine%20permits%20a,this%20doctrine%20has%20attracted%20widespread%20scholarly%20criticism. (Accessed on: 15 Dec 2025); Lieblich, E. [2024] 'Self-Defence against Non-State Actors and the Myth of the Innocent State', pp. 225-256 in Bhuta, N. et al. [2024] *Global*

Rights? Human Rights in Complex Governance OUP; Roy, N. [2024] 'Contested Grounds and Missing Sticks: Assessing the Legality of India's Surgical Strikes in Pakistan' *India Quarterly: A Journal of International Affairs* 80(4); Deeks, A.S. [2012] 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense' *Virginia Journal of International Law* 52, pp. 483–550).

2.6.India's Doctrinal Evolution: From Strategic Restraint to a Proactive Self-Defence Posture

India's state practice has become a significant case study for *jus ad bellum* scholarship. Traditionally, India adhered to a posture of "strategic restraint," limiting responses to attacks attributed to Pakistan-based groups to defensive measures within Indian territory (Rao, S. [2016] 'The Kargil Incident – Historical Analysis' *Indian Historical Review* 43(1), pp. 1-33).

The Kargil conflict dramatically exposed the limitations of this posture. Scholars widely cite Kargil as a doctrinal inflection point: the conflict demonstrated that strictly reactive defence created strategic vulnerabilities (Burra, S. [2018] 'Use of Force as Self-Defence against Non-State Actors and TWAIL Considerations: A Critical Analysis of India's State Practice' *Asian Yearbook of International Law* 24, pp. 106-127).

2.7.India's Post-2016 Cross-Border Operations and the Framing of Self-Defence

A. The 2016 "Surgical Strikes"

In 2016, India publicly described its cross-LoC action as "pre-emptive" and tied to specific intelligence about imminent attacks. Scholars note that the government intentionally avoided explicit invocation of Article 51 or terms such as "self-defence," instead employing strategically ambiguous language to avoid legal controversy while signalling deterrence (Ministry of External Affairs [2016] 'Transcript of Joint Briefing by MEA and MoD' *Ministry of External Affairs* [Online]. Available at: https://www.mea.gov.in/media-briefings.htm?dtl/27446/Transcript_of_Joint_Briefing_by_MEA_and_MoD_September_29_2016 (Accessed on: 10 Dec, 2025); Singh, S. [2017] *India's Surgical Strikes: The New*

Normal? Penguin; Pant H.V. et al. [2017] 'India's Response to Terrorism: Surgical Strikes and Beyond' *ORF Occasional Paper*; Desai, B.H. [2017] ''Surgical Strikes' by India: Taking International Law Seriously', *Economic and Political Weekly* 52(5); Sasikumar, K. [2019] 'India's Surgical Strikes: Response to Strategic Imperatives' *SJSU ScholarWorks*. [Online]. Available at: https://scholarworks.sjsu.edu/pols_pub/29/ (Accessed on: 10 Dec 2025)).

B. The 2019 Balakot Airstrike

The official description of the Balakot strike as "non-military pre-emptive action" attracted extensive academic commentary.

(Ministry of External Affairs [2019] 'Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM training camp at Balakot' *Press Release* [Online]. Available at: https://www.mea.gov.in/media-briefings.htm?dtl/31090/Statement+by+Foreign+Secretary+on+26+February+2019+on+the+Strike+on+JeM+training+camp+at+Balakot (Accessed on: 11 Dec 2025); Sharma, D. et al. [2019] 'The Balakot Strikes: Analysing India's "Non-Military Pre-emptive Action' *OpinioJuris*)

C. Operation Sindoor (2025)

India's 2025 response to the Pahalgam attack further reflects its evolving posture. The official statement explicitly referenced deterrence, pre-emption, proportionality, and the host state's failure to suppress terrorist infrastructure—language closely mirroring UOU doctrine.

Across these episodes, literature converges on the assessment that India is shaping emerging customary law through practice, but is intentionally maintaining **strategic legal ambiguity**.

(Ministry of External Affairs [2025] 'Statement by Foreign Secretary: OPERATION SINDOOR, Ministry of External Affairs' [Online]. Available at: https://www.mea.gov.in/Speeches-Statements.htm?dtl/39473 (Accessed on: 11 Dec, 2025); Siddharth A. S. [2025] 'Treading the Grey Zones of International Law: India's Responses after

the Pahalgam Attack' *CSEP* [Online]. Available at: https://csep.org/blog/treading-the-grey-zones-of-international-law-indias-responses-after-the-pahalgam-attack/ (Accessed on: 12 Dec, 2025))

2.8.Domestic Incorporation of International Law in India

India adopts a formal dualist structure under Articles 73 and 253 of the Constitution. However, the Supreme Court has repeatedly held that customary international law is part of domestic law unless inconsistent with statute (People's Union for Civil Liberties; Vishaka). Scholars describe India's approach as "functional monism," particularly in human rights jurisprudence (Bhatia, G. [2018] 'Using International Law in Indian Constitutional Adjudication', *Constitutional Law and Philosophy*; Chandra, A. [2017] 'India and International Law: Formal Dualism, Functional Monism' *IJIL*).

Many scholars likewise argue that *jus cogens* norms possess a kind of constitutional supremacy within domestic legal orders—arguably including India's—especially in light of the Supreme Court's consistent recognition that customary international law is incorporated into municipal law unless displaced by legislation (O'Connell, M.E. [2012] 'Jus Cogens: International Law's Higher Ethical Norms' in Childress, D.E. [2012] *The Role of Ethics in International Law* CUP; Mota, C.G.R. [2024] 'The Hierarchical Implications of Jus Cogens: An Analysis of Schwarzenberger and Kelsen on the Recognition of the Prohibition of Torture and Genocide as Peremptory Norms'*Buffalo Human Rights Review* 30(1); Zemanek, K. [2011] 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order' pp. 381-410 in Cannizzaro, E. [2011] ed. *The Law of Treaties Beyond the Vienna Convention* OUP).

2.9.Comparative State Practice and the Post-9/11 Evolution of Pre-emptive Self-Defence

In the aftermath of the 9/11 attacks, the unprecedented scale and transnational character of the violence carried out in the name of self-defence produced what many scholars characterise as a moment of "normative rupture," opening space for a re-reading of Article 51 to address evolving security threats. A substantial body of scholarship analyses the role of the United

States in advancing this reinterpretation through a combination of state practice and legal reasoning. The Bush Doctrine has attracted sustained critical attention, particularly for blurring the distinction between pre-emptive and preventive self-defence. Although U.S. policy narratives portrayed the doctrine as a necessary response to asymmetric threats and the proliferation of weapons of mass destruction, critics contend that it fundamentally weakened the Charter framework by legitimizing preventive war. Recent academic analyses often place contemporary U.S. uses of force—including strikes against Iranian nuclear facilities and targets in Venezuela—within this continuing exceptionalist trajectory, further diluting the line between imminence and conjectural future threats. Israel's state practice has been examined alongside these developments, albeit through a distinct doctrinal prism. Scholars observe that Israel has long embraced pre-emptive force as a core element of its security strategy, particularly in confronting non-state actors operating from disputed or occupied territories. In this context, many contemporary commentators argue that post-9/11 state practice lends support to Israel's assertion of the recognized prerogative of acting in self-defence against NSAs, even within occupied or partially occupied territories (Schmitt, M.N. (2003) 'Counter-Terrorism and the Use of Force in International Law', International Law Studies 79, pp. 9-19; Doyle, Michael (2008) Striking First: Preemption and Prevention in International Conflict, Colombia Law School: Faculty Books; Gupta, S. (2008) 'The Doctrine of Pre-Emptive Strike: Application and Implications during the Administration of President George W. Bush', International Political Science Review 29(2), pp. 181-196; Pierson, C. (2004) 'Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom Destruction: Operation Iraqi Freedom', Denver Journal of International Law and Policy 33(1), pp. 150-178; Milanovik, M. (2025) 'Is Israel's Use of Force Against Iran Justified by Self-Defence?', EJIL: Talk! [Online]. Available at: https://www.ejiltalk.org/is-israels-use-of-force-against-iran-justified-by-self-defence/ (Accessed on: 23 Dec 2025); Milanovik, M. (2026) 'Some Further Thoughts on the Illegal US Attack on Venezuela: Self-Defence, Cyber, and Continuing Coercion', EJIL: Talk! [Online]. Available at: https://www.ejiltalk.org/is-israels-use-of-force-against-iran-justified-by-self-defence/ (Accessed on: 10 Jan 2026); Heinze, E.A. (2024) 'International Law, Self-Defence, and the Israel-Hamas Conflict', Parameters Spring 54(1), pp. 71-83).

2.10. Legal Justifications for Pre-emptive Counter-Terrorism Operations in the Literature

The legal literature identifies two principal justifications for contemporary pre-emptive counter-terrorism operations. The first is the expanded conception of imminence under Article 51, supported by post-9/11 Security Council practice (Schmitt, M.N. (2003) 'Counter-Terrorism and the Use of Force in International Law', International Law Studies 79, pp. 9-19). The second justification, more recent and controversial, concerns the emergence of a jus cogens prohibition on the use of terrorism. Scholars contend that terrorism's universal condemnation and criminalization across treaty law, Security Council resolutions, and domestic legal systems may justify limited pre-emptive force against non-state actors when territorial states are unwilling or unable to act (De Beer, A.C. (2019) 'The Prohibition of Terrorism as a Jus Cogens Norm' in De Beer, A.C. (2019), Peremptory Norms of General International Law (*Jus Cogens*) and the Prohibition of Terrorism, Brill/Nijhoff).

3. Significance of the Study

Prevailing state practice on the employing force for defensive purposes, including that of India, has reached a critical juncture at which international scholars are cautiously navigating the line between the normative evolution of customary rules governing self-defence and Article 51, on the one hand, and claims of legal exceptionalism, on the other. This tension is reflected in increasingly expansive interpretations and applications of previously established self-defence norms. Persistent difficulties relating to attribution and the evolving characteristics of an "armed attack" in the context of asymmetric warfare by non-state actors have prevented international scholars, practitioners, and even international tribunals from arriving at clear or definitive conclusions.

India's recent resort to force—arguably framed as "pre-emptive self-defence" and grounded in the UOU test of non-attribution—has further intensified these debates, raising serious questions about the legality of such actions under international law, particularly in light of India's failure to offer sufficiently detailed official justifications capable of withstanding

international legal scrutiny. Against this backdrop, the present thesis is both timely and significant. It addresses core issues of attribution, the armed attack threshold, and legality within the *jus ad bellum* framework in contemporary settings, with a primary focus on India. It does so through a comparative analysis with the United States and Israel—three states currently central to global debates on self-defence—while situating this inquiry alongside the incipient *jus cogens* rule banning acts of terrorism, thereby advancing a novel perspective that has thus far remained underexplored.

4. Problem Statement

The UN Charter's strict prohibition on the use of force—permitting self-defence only in response to an armed attack and with clear State attribution—has been increasingly challenged by the realities of asymmetric warfare. Cross-border violence carried out by non-state actors with uncertain links to States has blurred the threshold of "armed attack", complicated attribution, and raised doubts about the legality of pre-emptive self-defence. Such gaps are most noticeable when threats emerge from a host state that purportedly lacks the willingness or capacity to deal with them.

India's shift from a historically reactive posture to post-Kargil pre-emptive strikes against non-state actors abroad illustrates this normative tension. This study evaluates how India, in comparison to the United States of America and Israel, has responded to these challenges and whether its practice indicates a legitimate development of the law or a gradual erosion of its limits.

5. Objectives

1) To offer a reasoned assessment of the meaning and legal status of the ban on employment of armed force, especially its character as an overriding rule of international law from which no derogation is permitted.

2) To examine and critically evaluate the origins, development, and legal status of self-

defence under customary rules of the international legal order, and the UN Charter, with particular attention to its contemporary extensions—reactive, anticipatory, pre-emptive, and preventive self-defence.

2) To conduct a normative examination of the traditional principle of attribution and the evolving doctrines of non-attribution, and consequently the Unwilling or Unable standard, in justifying state action in self-defence.

3) To study India's interpretation of the legal rules governing attribution and the right of self-defence in theory and practice in the post-Kargil and the 9/11 attacks period.

4) To carry out a comparative study of how India, the United States, and Israel interpret and exercise the right of self-defence under international law.

5) To evaluate whether India's practice is shaping an emerging customary norm permitting pre-emptive self-defence against NSAs based on a lower threshold of attribution based on the "overall control" test, or on non-attribution and the UOU standard.

6) To assess whether the incipient universally binding rule under international law against terrorism has the potential to serve as a basis for state action in pre-emptive self-defence, including non-attributive self-defence or self-defence relying on a lowered attribution threshold.

6. Research Questions

1) What are the prevailing interpretations of anticipatory, pre-emptive, and preventive self-defence, and to what degree do these doctrines conform to existing international legal standards or depart from them?

2) To what degree have the notions of attribution with a lower threshold or the notion of "non-attribution" developed within State practice, and how far can they be justified under international law?

3) To what degree does India's recent employment of armed force in self-defence under the doctrine of "pre-emptive" self-defence relying upon a lower threshold of attribution or non-attribution withstand scrutiny under existing international legal standards?

5) How does India's evolving approach to self-defence against NSAs in counter-terrorism actions compare with other commensurate state practices, namely that of Israel and the United States?

6) Does the emerging or existing *jus cogens* norm of prohibition against terrorism have the potential to justify state action within an expansive notion of self-defence?

7. Methodology

This research adopts a doctrinal legal methodology, grounded in the systematic analysis of primary and secondary sources of international and Indian law. The doctrinal method is particularly suited to this inquiry, as the study is concerned not with empirical assessment but with the normative content of law, specifically the evolution of the norm of self-defence, India's contemporary practice relating to the employment of armed force in self-defence, and its interaction with comparable State practices, as well as the incorporation of international legal norms within the Indian legal framework and the emerging discourse on the prohibition of terrorism as a *jus cogens* norm. The research relies primarily on treaties, customary international law, general principles of law, international judicial decisions, national legislations, government notifications, and judgments, supplemented by authoritative scholarly writings.

8. Expected Outcome of the Research/Hypothesis

H1. Contemporary State practice—exemplified by India's reliance on pre-emptive force in counter-terrorism operations and comparable practices of other States—reflects an emerging reinterpretation of the right of self-defence that relaxes the traditional international law

requirements of armed attack and attribution.

H2. This practice, increasingly framed with reference to the prohibition of terrorism, evidences the gradual crystallization of a limited customary norm accommodating pre-emptive and non-attributive or attributive with a lower threshold self-defence in asymmetric conflict, rather than a wholesale erosion of the Charter's *jus ad bellum* framework.

9. Tentative Chapterization

I. Introduction
II. The Prohibition of the Use of Force as a *Jus Cogens* Norm
III. Reactive, Anticipatory, Pre-emptive and Preventive Self-Defence: Evolving Conceptions of Armed Attack and Attribution
IV. India's Modern Interpretation and Application of the Use of Force in Self-Defence – Cross-Border Counter-Terrorism Practice
V. India's Engagement with International Law
VI. Comparative State Practice: India, the United States, and Israel
VII. Conclusion

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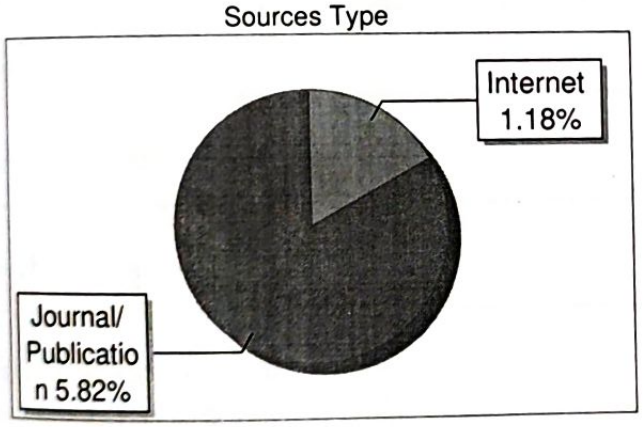

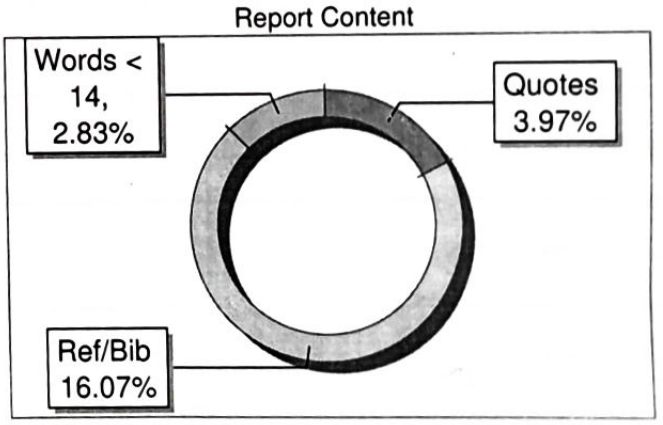

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Annexure-6

India's Modern Interpretation of the Use of Force in Self-Defence: Treading a Fine Line between Normative Evolution and Legal Exceptionalism

SHORT SYNOPSIS

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ABSTRACT

"The prohibition on the use of force" (Art. 2(4) of the United Nations Charter) has arguably attained the position of a jus cogens or peremptory norm under the international legal order. The "inherent right to use force in individual or collective self-defence" is one of the central exceptions to this prohibition. Article 51 of the UN Charter narrowly circumscribes this exception, authorising the employment of force for defensive purposes solely where an "armed attack" has occurred.

The practical application of this norm of self-defence, however, has significantly altered its implications. The most consequential modification of the norm has been that of "anticipatory self-defence", informed by the Caroline case, which signalled the customary emergence of the rule more than 100 years before the promulgation of the United Nations Charter. This case laid down the new rule that force is permissible where it is undertaken in self-defence before the actual "armed attack", if the threat is "instant, overwhelming, leaving no choice of means, and no moment for deliberation".

Even though the principle of "anticipatory self-defence" sat uneasily with the restrictive scope of Article 51 of the Charter from the start, it underwent further uncomfortable transformation with the advent of asymmetrical war and cross-border terrorism, with varying degrees of control by state/s. It changed the rules of attribution, as much as it created re-conceptualisations of the existing norm of "anticipatory self-defence": preemptive and preventive self-defence.

India's adaptation of the international rule of self-defence, both in theory and in practice, has reflected this evolution of the norm of self-defence. From a reactive and restrained stance, India has chosen to undertake cross-border attacks in self-defence preemptively, while implicitly justifying its actions based on both self-defence and the "unwilling and unable" doctrine.

This thesis critically examines whether India's interpretation and application of self-defence reflect a broader normative shift in the body of law on the resort to force, contributing to the emergence of new customary rules, or whether such practices represent departures from the established jus ad bellum framework. By situating India's conduct as a state in comparison with the state practices of the US and Israel within wider international debates, the study assesses the implications of these developments for the coherence, stability, and future trajectory of international law on self-defence.

Key words: *Jus Cogens*, Self-Defence, Unwilling or Unable, Anticipatory, Preemptive, Preventive

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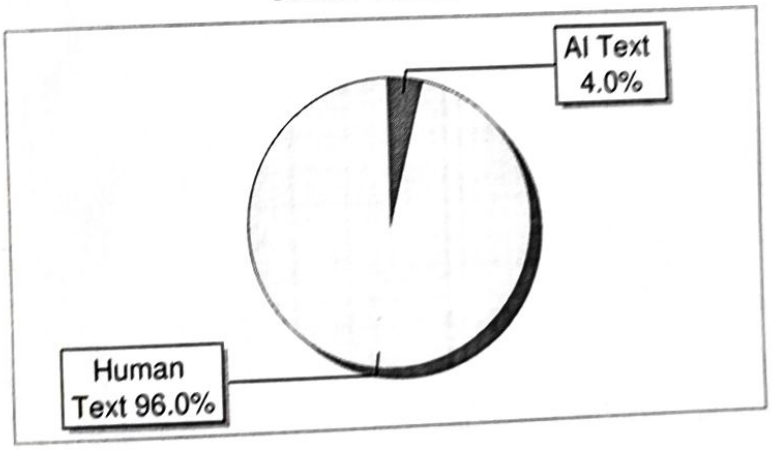

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